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In The

Supreme Court of the United States

October Term 1982

ARIZONA GOVERNING COMMITTEE FOR TAX DEFERRED ANNUITY AND DEFERRED COMPENSATION PLANS, STATE OF ARIZONA, et al.,

Petitioners,

v.

NATHALIE NORRIS, on behalf of herself and all others similarly situated,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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COUNTERSTATEMENT OF THE CASE

From the outset, petitioners grossly misrepresent one of the stipulated facts here as they did in the court below. The entire Petition is predicated on the stipulation that "all of the insurance companies which were available to Arizona to provide life annuities used . . . sex-based mortality tables." Petition for Writ of Certiorari at 3. This alleged "fact" is repeated throughout the Petition in a variety of forms. *Id.* at 8, 9, 11, 12, 14, 15, 17, 20, 21. In truth, however, the parties stipulated only that all companies *designated by the Arizona Governing Committee* as funding media use gender-based actuarial tables. *Id.* at A-16; Joint Stipulated Statement of Facts at pp. 8, 10. The record is totally silent on efforts made by the state to negotiate with the selected insurance companies, or any other companies, for non-discriminatory provisions.

The opinion of the district court correctly summarizes the facts to which the parties stipulated. Petition for Writ of Certiorari at A-13 to A-16.

SUMMARY OF ARGUMENT

In *City of Los Angeles, Department of Water and Power v. Manhart*, 435 U.S. 702 (1978), this Court held that retirement or pension plans which classify women on the basis of sex rather than individual characteristics are impermissible under Title VII of the 1964 Civil Rights Act, as amended, 42 U.S.C. § 2000e (Title VII).

Manhart involved an employer-operated pension plan which required unequal contributions from men and women; this case involves a pension plan offered by an employer with unequal payments to men and women. Both plans discriminate against women as a class; both plans treat women differently

from men solely on the basis of their sex. The decisions of the Ninth Circuit Court of Appeals and the district court are fully faithful to *Manhart*. The decisions do nothing more than apply *Manhart* to a discriminatory plan which an employer selects and makes available to its employees. Because the fundamental issue in this case has previously been resolved by this Court, and because there is no inconsistency or confusion in any of the lower courts, the Petition for Certiorari should be denied.

ARGUMENT

I. THE COURT OF APPEALS CORRECTLY APPLIED THE HOLDING IN *MANHART*.

A. *The Holding of the Court of Appeals is Consistent with* Manhart.

This Court has held that a pension plan requiring women to make greater payments than men in order to receive the same monthly benefits is an express violation of Title VII. *City of Los Angeles, Department of Water and Power v. Manhart*, 435 U.S. 702 (1978). This case presents a logical application of *Manhart*.

Petitioners struggle to demonstrate that there is confusion and inconsistency among the lower courts. This is simply not true. Under *Manhart*, lower courts have repeatedly struck down defined contribution plans which require male and female employees to make equal contributions but pay to women smaller annuities than to men. *EEOC v. Colby College*, 589 F.2d 1139 (1st Cir. 1978); *Hannahs v. New York State Teachers' Retirement System*, 26 Empl. Prac. Dec. ¶ 32,037, 26 Fair Empl. Prac. Cas. 527 (S.D.N.Y. 1981); *Peters v. Wayne State University*, 476 F. Supp. 1343 (E.D. Mich. 1979), *appeal pending*, Nos. 79-1670, -1671 (6th Cir. argued

April 7, 1981); *Spirt v. Teachers Insurance and Annuity Association*, 475 F. Supp. 1298 (S.D.N.Y. 1979), *appeal pending*, No. 79-7715 (2d Cir.). These courts have also held unequivocally that retirement or pension programs which differentiate women as a class from men as a class violate Title VII under *Manhart*. *See also Retired Public Employees' Association v. California*, 677 F.2d 733 (9th Cir. 1982), *petition for cert. filed*, ___ U.S.L.W. ___ (U.S. August 14, 1982) (No. 82-262); *Probe v. State Teachers' Retirement System*, 27 Fair Empl. Prac. Cas. 1306 (C.D. Cal. 1981), Nos. 81-5865, -5866 (9th Cir. argued July 7, 1982); *Women in City Government United v. City of New York*, 515 F. Supp. 295 (S.D.N.Y. 1981); *Shaw v. International Association of Machinists and Aerospace Workers*, 24 Fair Empl. Prac. Cas. 995 (C.D. Cal. 1980).

Petitioners' argument that the existence of nondiscriminatory options validates this otherwise unlawful plan is equally unsupported by the case law.[1] *Shaw v. International Association of Machinists and Aerospace Workers*, 24 Fair Empl. Prac. Cas. at 997; *Reilly v. Robertson*, 266 Ind. 29, 360 N.E.2d 171, *cert. denied*, 434 U.S. 825 (1977). Further, no court has upheld a discriminatory retirement or pension plan simply because it is optional and not mandatory as in *Manhart*. *Cf. Peters v. Wayne State University*, 476 F. Supp. at 1347.

The claim of petitioners and amicus curiae American Council of Life Insurance that the application of *Manhart* to the present case would "revolutionize the insurance industry" is

[1]This is akin to arguing that a white-only cafeteria in an office building would be defensible if the employer also maintained a desegregated cafeteria on the premises. See note 4 *infra*, p. 5.

also unfounded.[2] Respondents are challenging discriminatory employment practices, not discrimination suffered in the insurance industry. The relief granted extends only to the State of Arizona as an employer, not to "wholly independent third-party insurers . . . ." Brief of American Council of Life Insurance as Amicus Curiae in Support of the Petition at 12.

The decision of the court of appeals is not inconsistent with *Manhart* because it imposes laibility on an employer that contracts with private insurance companies. To the contrary, this Court specifically addressed that issue in *Manhart*, when it cautioned: "We do not suggest, of course, that an employer can avoid his responsibilities by delegating discriminatory programs to corporate shells." 435 U.S. at 718 n.33. Courts have since held employers liable where the annuity option in a plan is administered by private insurance companies using sex-segregated actuarial tables. *EEOC v. Colby College*, 589 F.2d 1139 (1st Cir. 1978); *Peters v. Wayne State University*, 476 F. Supp. 1343 (E.D. Mich. 1979).[3]

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[2]The doomsday cries contained in the Council's brief are the very same cries expressed in its amicus brief in *Manhart:* "The majority decision below, if sustained by this Court . . . could indirectly impose on the insurance industry a new federal actuarial rule requiring the utilization of 'unisex' actuarial tables. This would seriously disrupt the life insurance and pension industry in the United States . . . ." Brief of Amicus Curiae American Council of Life Insurance on Behalf of Petitioners in *City of Los Angeles, Department of Water and Power v. Manhart* at 3.

[3]Petitioners attempt to distinguish these cases on the basis that employers took an active role in administering or developing the allegedly discriminatory annuity program while in this case the State of Arizona did not. The court of appeals correctly found this distinction to be "illusory." Arizona selected the funding media for the plan, it approved participation in the plan and it deducted the appropriate amount from the employee's salary. The plan could not exist but for the action of the State of Arizona.

Finally, petitioners argue here, as they did below, that a showing of discriminatory intent is required. However, no affirmative showing of intent was required in *Manhart*. Petitioners' attempt to distinguish *Manhart* from this case on the basis that *Manhart* involved an employer-operated plan is a distinction without a difference. In this case petitioners adopted a plan which provides lesser benefits to women than to men; in *Manhart* the employer established a plan which required women to pay in more than men. Both plans were adopted by the employer. There is no legal basis to argue that an employer is relieved of liability under Title VII because someone else drafted the plan which it adopted.[4]

Furthermore, all of the cases cited by petitioner requiring proof of discriminatory motive are cases in which disparate treatment has been alleged. *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248 (1981); *Furnco Construction Corp. v. Waters*, 438 U.S. 567 (1978); *International Brotherhood of Teamsters v. United States*, 431 U.S. 324 (1977); *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973). It is well established that in cases involving facially neutral policies, the test is disparate impact, not intent. *Dothard v. Rawlinson*, 433 U.S. 321 (1977); *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971).

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[4]For example, the state could provide a meal service through a food contractor which would serve employees in a cafeteria located in the office building. The employer has no involvement except to select one food contractor who does all of the meal preparation and service. Meals are optional and employees are free to eat outside the building or bring their lunch. None of these factors could render the meal service lawful under Title VII if separate eating facilities, separate lines, and separate menus were maintained for blacks and whites. However, under petitioners' argument, this food service would have to be permissible because (1) it is voluntary; (2) other nondiscriminatory options exist; (3) the food contractor, not the employer, designed the discriminatory meal program; and (4) to invalidate the service might adversely affect the industry.

The court of appeals faithfully applied this Court's holding in *Manhart* to the present situation, where monthly payments under the state's annuity option are less for women than for men. Its opinion is not inconsistent with the decisions of this Court or any other court.

B. *This Plan Does Not Fall Within the Open Market Exception Discussed in* Manhart.

Petitioners argue that this case falls under the so-called "open market exception" in *Manhart* for two reasons. First, they assert that the life annuities offered "fully represent those available on the open market," a fact which is nowhere in the record. Furthermore, as the court of appeals correctly stated, "Title VII has never been construed to allow an employer to maintain a discriminatory practice merely because it reflects the marketplace or available options outside the employment context." *Norris v. Arizona Governing Committee for Tax Deferred Annuity*, 671 F.2d 330, 335 (9th Cir. 1982).[5]

In *Manhart* this Court stated that employers could "set aside equal retirement contributions for each employee and let each retiree purchase the largest benefit which his or her accumulated contributions could command in the open market." 435 U.S. at 717-18. This option allows an employer to give money to an employee for him or her to purchase *any*

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[5] Petitioners' reliance on *Harris v. McRae*, 448 U.S. 297, *reh'g denied*, 448 U.S. 917 (1980), and *General Electric Co. v. Gilbert*, 429 U.S. 125 (1976), *reh'g denied*, 429 U.S. 1079 (1977), to support their contention that a defendant will not be held liable for discrimination against women for conditions not created by the defendant is misplaced. *Gilbert* was distinguished from the present situation in *Manhart*. ("[T]he General Electric plan did not involve 'discrimination based upon gender as such' . . . [but] on the basis of a special physical disability." 435 U.S. at 715.) In *Harris* the state refused to remove an obstacle which prevented women from exercising their right to abortion. Petitioners, on the other hand, affirmatively adopted a plan which discriminates against women.

insurance he or she can buy. That situation is totally distinct from the present case where the employer has contracted to make several policies with prescribed options available to an employee to the exclusion of any other policies on the market. Employees participating in this plan who desire the annuity option have no choice but to select a discriminatory benefit.

Petitioners' second argument, that the plan falls within the open market exception because it provides a lump-sum payment option, also misinterprets the operative language. *Manhart* did not hold that providing employees with the opportunity to purchase benefits on the open market legitimates other discriminatory options. No case supports this conclusion. The discriminatory annuity option is exactly what is proscribed under *Manhart*.

II. THE RELIEF GRANTED BY THE DISTRICT COURT WAS PROPER.

The district court permanently enjoined petitioners from carrying out their obligations through the use of sex-segregated actuarial tables, and directed that *future* annuity payments to retired females equal those of similarly situated males. The relief awarded is well within the broad equitable powers Congress has granted to district courts in Title VII cases. 42 U.S.C. § 2000e-5(g).

Petitioners' attempt to gain review of the relief granted under a tenth amendment theory lacks merit. *National League of Cities v. Usery*, 426 U.S. 833 (1976), upon which petitioners rely, dealt with a conflict between the tenth amendment and Congress' power to override state sovereignty under the commerce clause. As the court of appeals noted, the holding in *National League of Cities* was specifically limited to the

commerce clause. *Norris*, 671 F.2d at 336.

In contrast, Title VII was extended to public employers pursuant to section 5 of the fourteenth amendment. *Fitzpatrick v. Bitzer*, 427 U.S. 445 (1976). The relationship between the fourteenth amendment and the tenth amendment which petitioners urge was unequivocally resolved in *New York Gaslight Club, Inc. v. Carey*, 447 U.S. 54 (1980), where this Court held that the tenth amendment is not a bar to a monetary award against a state in Title VII cases.

CONCLUSION

Under the deferred compensation plan designed by the State of Arizona, women receive smaller monthly payments under the annuity option than similarly situated men. The court of appeals correctly found this to be a violation of Title VII under *Manhart*. The prospective relief granted by the district court was, therefore, proper. Because all the issues presented by the petitioners have previously been decided by this Court, the Petition for Certiorari should be denied.

Respectfully submitted this 3d day of September, 1982.

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